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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 James Rhodes,

10 Plaintiff,

11 v.

12 Scottsdale Community College, et al.,

13 Defendants.  
14

No. CV-18-02063-PHX-RCC

**ORDER**

15 Pending before the Court is Defendant Scottsdale Community College’s Partial  
16 Motion to Dismiss First Amended Complaint (“Motion”). (Doc. 36.) Plaintiff’s First  
17 Amended Complaint (“FAC”) alleges discrimination based on age and race; retaliation;  
18 hostile work environment; and a violation of 42 U.S.C. § 1983. Defendant asks the Court  
19 to dismiss Plaintiff’s discrimination and hostile work environment claims. Furthermore,  
20 Defendant asks the Court to dismiss Plaintiff’s § 1983 claim, and Plaintiff responded  
21 consenting to dismissal. For the reasons stated herein, the Court will require Defendant to  
22 answer Plaintiff’s age discrimination and retaliation claims, but dismisses the racial  
23 discrimination, § 1983, and hostile work environment claims.

24 **I. FACTUAL SUMMARY**

25 Plaintiff’s FAC alleges that he was a Caucasian, Adjunct Culinary Arts Instructor  
26 employed by Defendant. When Plaintiff learned of two job openings for Front of House  
27 Manager and Executive Chef, he spoke to his supervisor—an African American man—  
28 about applying for the positions. The supervisor told Plaintiff he was “too old” and “too

1 fat” to get the jobs. Despite the discouragement, Plaintiff applied and was asked to  
2 interview with the hiring board. Before the interview, Plaintiff’s supervisor sent an email  
3 to the board indicating that Plaintiff had not properly cleaned the kitchen after a class.  
4 The supervisor later rescinded this statement, but only to Plaintiff; he did not inform the  
5 board that his allegations were false.

6 Plaintiff was not selected for either position; the positions were given to two  
7 African American males under the age of 40. Plaintiff alleges these individuals were less  
8 qualified for the position than Plaintiff.

9 Plaintiff then complained to Human Resources about the supervisor’s statements.  
10 After the complaint, Plaintiff (1) received another false review from his supervisor, (2)  
11 had one class cancelled, and (3) had one class given to another instructor. With no classes  
12 remaining, Defendant did not renew its employment contract with Plaintiff.

## 13 **II. STANDARD OF REVIEW**

14 A motion under 12(b)(6) must contain a “short and plain statement of the claim  
15 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). While Rule 8 does  
16 not require detailed factual allegations, “it demands more than an unadorned, the  
17 defendant unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
18 (2009). “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a  
19 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*,  
20 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content  
21 that allows the court to draw the reasonable inference that the defendant is liable for the  
22 misconduct alleged.” *Id.* The complaint must contain more than “a statement of facts that  
23 merely creates a suspicion [of] a legally cognizable right of action.” *Twombly*, 550 U.S.  
24 at 555. Meaning, “[t]hreadbare recitals of the elements of a cause of action, supported by  
25 mere conclusory statements, do not suffice.” *Id.*

26 “Determining whether a complaint states a plausible claim for relief [is] . . . a  
27 context-specific task that requires the reviewing court to draw on its judicial experience  
28 and common sense.” *Iqbal*, 556 U.S. at 679. So, although a plaintiff’s specific factual

1 allegations may be consistent with a constitutional claim, a court must assess whether  
2 there are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

3 If the plaintiff “fails to state a claim on which relief may be granted,” the District  
4 Court must dismiss the claim. 28 U.S.C. §1915(e)(2)(B)(ii). But, a “complaint [filed by a  
5 pro se litigant] ‘must be held to less stringent standards than formal pleadings drafted by  
6 lawyers.’” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (quoting *Erickson v.*  
7 *Pardus*, 551 U.S. 89, 94 (2007) (per curiam)). Dismissal is appropriate if the complaint’s  
8 deficiencies cannot be cured by amendment; but if the pleading can be remedied through  
9 the addition of facts, the claimant should be granted an opportunity to amend a complaint  
10 prior to final dismissal. *Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000).  
11 However, repeated failure to cure deficiencies may affect whether the court should grant  
12 leave to amend yet again. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th  
13 Cir. 1989). In fact, the Court’s discretion to deny leave to amend is particularly broad  
14 where a plaintiff has previously been permitted to amend his complaint. *Sisseton-*  
15 *Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996); *see Bonin v.*  
16 *Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (“[A] district court does not abuse its  
17 discretion in denying a motion to amend where the movant presents no new facts but only  
18 new theories and provides no satisfactory explanation for his failure to fully develop his  
19 contentions originally.”).

### 20 **III. RACIAL DISCRIMINATION CLAIM**

21 Defendant’s Motion claims that Plaintiff’s alleged facts fail to demonstrate that  
22 racial animus motivated the employment decision. In addition, Defendant argues,  
23 Plaintiff has only made conclusory statements that the individuals hired were similarly  
24 situated to Plaintiff.

25 A complaint of racial discrimination in employment must plead facts  
26 demonstrating “(1) he was a member of a protected class, (2) he was qualified for the  
27 position he sought . . . , (3) he suffered an adverse employment action, such as  
28 termination, demotion, or denial of an available job, and (4) some other circumstance

1 suggests discriminatory motive.” *Pinder v. Emp’t Dev. Dep’t.*, 227 F.Supp.3d 1123, 1137  
2 (E.D. Cal. 2017) (citing *Peterson v. Hewlett–Packard Co.* 358 F.3d 599, 603 (9th Cir.  
3 2004) (finding discrimination claim must be “more than purely conclusory allegations of  
4 alleged discrimination, with no concrete, relevant particulars.” (internal citation and  
5 quotation marks omitted))). While a claimant need not establish a prima facie case of  
6 discrimination to withstand a motion to dismiss, he must meet the minimal pleading  
7 standards set forth in the Federal Rules of Civil Procedure. *Swierkiewicz v. Sorema N.A.*,  
8 534 U.S. 506, 510-11 (2002); *see also Al-Kidd v. Ashcroft*, 580 F.3d 949, 976 (9th Cir.  
9 2009), *rev’d on other grounds sub nom.*, *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011)  
10 (noting that *Twombly* reaffirmed the pleading requirement for discrimination claims as  
11 stated in *Swierkiewicz*). “The issue [on a motion to dismiss] is not whether a plaintiff will  
12 ultimately prevail but whether the claimant is entitled to offer evidence to support the  
13 claims.” *Id.* So, at this stage, a claimant’s allegations need only “nudge . . . the claim  
14 across the line from conceivable to plausible.” *Al-Kidd*, 580 F.3d at 976.

15 Plaintiff’s racial discrimination allegations, however, do not cross this line.  
16 Plaintiff alleges only that two African American men were hired instead of him and that  
17 his supervisor was also African American. The basic fact that all three individuals were  
18 African American does not, in and of itself, suggest racial bias. There is no direct  
19 evidence of racial animus. While the supervisor said Plaintiff was “too old” and “too fat”  
20 to get the jobs, he made no comment about Plaintiff’s race. Moreover, the proffered  
21 circumstantial evidence—that both supervisor and the hired employees were African  
22 American—is a barren, conclusory allegation that does not lead a reasonable fact finder to  
23 connect the hiring decision to racial animus. There are no operative facts suggesting that  
24 either the supervisor or the hiring board made its employment determination based on  
25 Plaintiff’s race. Plaintiff’s allegations simply do not raise the claim above the speculative  
26 level, and do not provide the minimal support necessary to infer discrimination. *See*  
27 *Iqbal*, 556 U.S. at 678. (“Threadbare recitals of the elements of a cause of action,  
28 supported by mere conclusory statements, do not suffice.”). These conclusory allegations

1 will not withstand a motion to dismiss.

2 In addition, Plaintiff has had an opportunity to amend, was given several  
3 extensions of time to develop his claims and consult with the Pro Se Clinic, and was  
4 informed by the Court as to the deficiencies in the previous complaint, but has not  
5 remedied the deficiencies. Moreover, his response to the Motion to Dismiss offers no  
6 reason for the Court to conclude that amendment would be effective. Therefore, the Court  
7 will dismiss this claim with prejudice.

#### 8 **IV. AGE DISCRIMINATION CLAIM**

9 Defendant next asserts that Plaintiff's age discrimination claim fails because he  
10 has not connected his failure to be hired to discriminatory animus based on age and  
11 Plaintiff's claim that the individuals hired were less qualified for the positions is  
12 conclusory and does not show the employees were similarly situated.

13 An age discrimination claim must plead facts demonstrating the claimant: (1) is  
14 over forty years old; (2) suffered an adverse employment action; (3) was qualified for the  
15 position; and (4) was replaced with a younger person with similar qualifications or under  
16 facts suggesting discrimination. *See Diaz v. Eagle Produce Ltd.*, 521 F.3d 1201, 1207-08  
17 (9th Cir. 2008). Furthermore, when a claimant alleges that a biased employee caused the  
18 hiring process to become discriminatory, "the critical question is not whether a biased  
19 subordinate had input, but whether he had *impact* . . . the issue is whether the biased  
20 subordinate's discriminatory reports, recommendation, or other actions caused the  
21 adverse employment action." *See, e.g., Furline v. Morrison*, 953 A.2d 344, 356 (D.C.  
22 2008) (emphasis in original). "[I]f a subordinate, in response to a plaintiff's protected  
23 activity, sets in motion a proceeding by an independent decisionmaker that leads to an  
24 adverse employment action, the subordinate's bias is imputed to the employer if the  
25 plaintiff can prove that the allegedly independent adverse employment decision was not  
26 actually independent because the biased subordinate influenced or was involved in the  
27 decision or decisionmaking process." *Bergene v. Salt River Project Agric. Improvement*  
28 *& Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001).

1 Here, Plaintiff alleges that his supervisor made a discriminatory remark that  
2 Plaintiff would not be hired because of his age, and shortly thereafter took credit for  
3 ensuring that Plaintiff was not hired by the board. At the pleading stage, the Court finds  
4 this creates a sufficient nexus between the discriminatory remarks and the adverse  
5 employment action. *See Mustafa v. Clark Cty. Sch. Dist.*, 157 F.3d 1169, 1190 (9th Cir.  
6 1998).

7 Finally, Plaintiff alleges that other individuals applied for the same jobs,  
8 interviewed in front of the same board, and were offered the positions despite Plaintiff  
9 being more qualified. While this allegation may not survive summary judgement, it  
10 sufficiently pleads that the individuals were similarly situated and survives motion to  
11 dismiss. Plaintiff has demonstrated that he should be permitted to offer further evidence  
12 to support this claim. *See Al-Kidd*, 580 F.3d at 976.

#### 13 **V. HOSTILE WORK ENVIRONMENT CLAIM**

14 Third, Defendant states that the comments made to Plaintiff do not raise to the  
15 level of creating a hostile work environment. The Court agrees.

16 “An employer is liable under Title VII for conduct giving rise to a hostile  
17 environment where the employee proves (1) that he was subjected to verbal or physical  
18 conduct of a harassing nature, (2) that this conduct was unwelcome, and (3) that the  
19 conduct was sufficiently severe or pervasive to alter the conditions of the victim’s  
20 employment and create an abusive working environment.” *Kortan v. Cal. Youth Auth.*,  
21 217 F.3d 1104, 1109 (9th Cir. 2000) (quoting *Pavon v. Swift Trans. Co.*, 192 F.3d 902,  
22 908 (9th Cir. 1999)). The “objectionable environment must be both objectively and  
23 subjectively offensive, one that a reasonable person would find hostile or abusive, and  
24 one that the victim in fact did perceive to be so.” *Id.* (quoting *Montero v. AGCO Corp.*,  
25 192 F.3d 856, 860 (9th Cir. 1999)). As Ninth Circuit has explained:

26 To determine whether conduct was sufficiently severe or pervasive to  
27 violate Title VII [due to a hostile work environment], we look at all the  
28 circumstances, including the frequency of the discriminatory conduct; its  
severity; whether it is physically threatening or humiliating, or a mere

1 offensive utterance; and whether it unreasonably interferes with an  
2 employee's work performance.

3 *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003), *as amended*, (Jan. 2,  
4 2004) (internal citations and quotation marks omitted); *see also Kortan*, 217 F.3d at 1104  
5 (plaintiff who alleged supervisor mailed postcards to her home, stated females are  
6 "castrating bitches," and called the plaintiff "Medea," did not raise a hostile work  
7 environment claim); *Manatt v. Bank of Am.*, 339 F.3d 792, 798 (9th Cir. 2003) (plaintiff  
8 who alleged coworkers made racist remarks, called him "China man," and "pulled their  
9 eyes back with their fingers in an attempt to imitate or mock the appearance of Asians"  
10 did not create a hostile work environment); *but see Fuller v. Idaho Dep't of Corr.*, 865  
11 F.3d 1154, 1163 (9th Cir. 2017) (employer who sided with plaintiff's alleged rapist raised  
12 sufficient hostility to withstand summary judgment).

13 As pleaded, Plaintiff alleges that on one occasion his supervisor called him "too  
14 old" and "too fat" to get the Front of House Manager and Executive Chef positions. In  
15 addition, the supervisor sent an email to the hiring board, falsely stating that Plaintiff's  
16 job performance was subpar. Plaintiff also alleges he was given a negative performance  
17 review, one of his culinary classes was cancelled, and he was replaced in a second class.  
18 Plaintiff has not pleaded facts showing that his treatment was frequently and severely  
19 abusive, such that it created an objectively hostile work environment. Neither have  
20 Plaintiff's FAC nor his response to Defendant's Motion suggested he can plead any  
21 further hostile actions that could support this claim. Because Plaintiff has had a previous  
22 opportunity to amend, has not remedied this deficiency, and gives no indication that  
23 amendment would resolve the problems, the Court finds amendment would be futile and  
24 dismisses this claim with prejudice.

25 **VI. § 1983 Claim**

26 Plaintiff has conceded that his § 1983 claim may be dismissed. The Court will  
27 grant this request.

28 ///

1 Accordingly, IT IS ORDERED:

2 1. Defendant Scottsdale Community College's Partial Motion to Dismiss First  
3 Amended Complaint is GRANTED IN PART. (Doc. 23.) Within 21 days of the  
4 date of this Order, Defendant must answer Plaintiff's age discrimination and  
5 retaliation claims. Plaintiff's hostile work environment and racial discrimination  
6 claims are DISMISSED with prejudice.

7 2. Plaintiff's claim under 42 U.S.C. § 1983 is voluntarily DISMISSED.

8 Dated this 23rd day of December, 2019.

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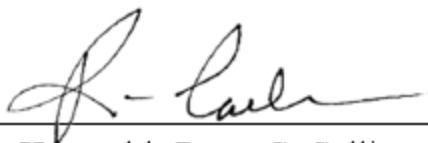
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Honorable Raner C. Collins  
Senior United States District Judge